87-2114

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LUIS RODRIGUEZ and RAUL REYES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether violation of the precepts of 18 U.S.C. Sec. 3500 (the Jencks Act) and the principles of *Brady v. Maryland*, 373 U.S. 83 (1963) can be harmless error?

(2) Whether the cumulative effect of bad faith police action and prosecutorial misconduct can rise to the level of reversible error?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all the parties to the instant Petition. However, the Court should note that the appeal of Leocadio Moreno, Francisco Montoya, Jean Doran, Hector Orozco, Orlando Ravelo, and Fernando Fernandez, Petitioners' co-defendants at trial, were consolidated with Petitioners' appeal in the Ninth Circuit.

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THE OPINION BELOW

The lower court's opinion is unpublished. It is reproduced as Appendix A hereof, and is cited as *United States of America v. Leocadio Moreno, Francisco Montoya, Jean Doran, Hector Orozco, Orlando Ravelo, Luis Rodriguez, Raul Reyes, and Fernando Fernandez,* unpublished opinion nos. 85-1341/1342/-1343/1344/86-1006/1007/1230 (9th Cir., delivered February 22, 1988).

JURISDICTION OF THIS COURT

The Ninth Circuit entered its Opinion and Judgment on February 22, 1988. Motion for rehearing was denied on April 29, 1988. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 33 of the Federal Rules of Criminal procedure provides, in pertinent part, that "[T]he court on motion of a defendant may grant a new trial to him if required in the interests of justice. . . . A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . ."

18 U.S.C. 3500 is referred to in this Petition and is reproduced as Appendix B hereof.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "Sec.1 *Citizens of*

the United States: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

The complexity of the nature of the investigation leading up to the arrest and prosecution of the Petitioners is quite complex and requires a rather lengthy statement of the case to place the issues in the proper perspective.

This case is fraught with serious questions concerning the propriety of government action: from the preliminary investigation by the Drug Enforcement Agency to the closing argument by the prosecutor, substantial issues effecting the rights of all citizens exist. The case derives from an international "sting" operation involving an undercover smuggling scheme originating in the Caribbean Islands of Turks and Caicos. Acting as agent provocateur under the authority and guidance of the Miami, Florida Division of the DEA, former drug smuggler Barry Seal, seeking reconsideration of a ten year period of incarceration to which he had been sentenced, travelled to South Caicos, British West Indies, and entered into negotiations to fly to South America, pick-up and deliver a load of Bolivian cocaine on behalf of Co-Defendant Leocadio Moreno. Seal arranged for his brother-in-law Billy Bob Bottoms, also a former drug smuggling pilot, to fly the aircraft. Co-Defendant Jaime Ortiz was alleged to have acted as co-pilot, and Co-Defendant Jean Doran allegedly served as interpreter. Co-Defendant Hector Orozco was alleged to have been the source of the subject contraband, and Co-Defendant Francisco Montoya was allegedly Moreno's partner in the venture.

As the testimony at trial revealed, the plan contemplated that the crew would fly from the Turks and Caicos to Bolivia, pick up the cocaine and return to the British West Indies. Although Moreno purportedly planned to eventually transport the cargo by boat to some destination along the Florida coast, it is abundantly clear that the subject flight did not comprehend the importation of any contraband within the territorial jurisdiction of the United States.

After the flight departed for Bolivia, however, DEA undercover operatives undertook an initiative to cause the plane, its passengers and cargo to be brought into the customs jurisdiction of the United States. Government agents thereafter prompted arrangements for the direct delivery of the load to Moreno's associates in the Los Angeles, California area. Neither Billy Bob Bottoms nor the co-defendant passengers were advised or otherwise aware of the change in return destination, and accordingly having acquired their cargo, left Bolivia on a return course to the British West Indies.

Thus, as Bottoms testified, it was an unwelcome suprise to Co-Defendants Ortiz, Orozco, and Doran when, contrary to his original instructions and their understanding, Bottoms received radio instructions from Seal to fly directly to the United States (pursuant to DEA instructions). Despite the protests of the co-defendant passengers who had not agreed to undertake the considerably greater risk of importing cocaine into the United States, pilot Bottoms, landed the plane in Tyler County, Texas, as instructed by Seal. There it was met by another aircraft occupied by Seal, the agents, Montoya, and Moreno, who had left the Islands to meet with the others in Miami.

At the suggestion of the undercover DEA agents, Henderson, Nevada was selected as the ultimate destination of the

plane. As the agents testified, they described the facility (inaccurately) as a remote airfield halfway between Las Vegas and Los Angeles, well-suited as a location from which to transport the cargo by motor vehicle to Los Angeles. Thus, only after arrival at Tyler, Texas, Bottoms was instructed for the first time to fly the plane to the Las Vegas area.

In anticipation of the arrival of the "load" aircraft piloted by Bottoms, the Miami agents, together with Seal and Co-Defendants Moreno and Montoya, flew to Las Vegas, Nevada where they were met by undercover DEA agents who were posing as Seal's purported "ground crew". This group then proceeded to the Hacienda Hotel where they were to await the arrival of the "load" plane.

When Bottoms landed the "load" plane in Henderson, Nevada it was met by the undercover DEA "ground crew". Whereupon the cargo was unloaded and transported by undercover agents to the Continental Hotel in Las Vegas. Moreno was told that these purported ground crew members would safeguard the cargo in their custody until Seal had been paid for transportation and ground crew services. The idea being that the DEA would hold the cargo "hostage" to force Moreno to seek assistance from outside sources and thereby maximize the possible number of arrests and forfeitures.

Moreno managed to arrange for part payment to other undercover DEA agents in Miami and for the delivery of further funds from an unknown source in California. Thereafter, Las Vegas DEA agent Bustos (acting undercover as a ground crew member) arranged to meet Moreno's designee in the parking lot of the Hacienda and follow Bustos to the delivery site in a vehicle capable of transporting the load.

Moreno and several undercover agents waited at the Hacienda to signal to Bustos when the contact vehicle arrived.

However, during the ensuing period of delay, Moreno failed to signal his acknowledgement of any of the incoming traffic. As the agents specifically testified, in response to their inquiry upon the appearance of a tan Oldsmobile bearing Nevada plates and occupied by at least two unknown men, the exasperated Moreno expressly advised: "Those are *not* my people." Upon the eventual arrival of a red Toyota pickup with Co-Defendants Orozco and Ravelo, Moreno identified it as the vehicle they had been waiting for. Bustos led the pickup to the parking lot of the Continental Hotel just a few blocks away.

Bustos testified that during part of the journey to the Continental Hotel he observed in his rear view mirror that a tan car was in the traffic behind him on the busy Las Vegas "Strip". Bustos would later testify that this activity was consistent with "counter-surveillance" techniques. Bustos testified, however, that he was unable to identify either the driver or the passenger of the tan auto. Moreover, as Bustos further testified, when he turned in the direction of the Continental Hotel followed by the pickup, the other car went the opposite way.

Upon arrival in the Continental parking lot, Co-Defendants Ravelo and Orozco loaded the pickup with two large opaque boxes allegedly containing cocaine and were thereupon arrested by Bustos. The red Toyota pickup was seized, impounded and forfeited by the DEA. It is abundantly clear from the record that no tan Oldsmobile was anywhere in sight. Neither was any such vehicle followed, stopped or its occupants detained for any purpose.

Substantially contemporaneous arrests were made of Co-Defendants Moreno, Montoya, Ortiz, and Doran. In contrast, Petitioner REYES was at home with his wife and children when, at approximately 2:00 in the morning of the following day, agent Bustos and a group of local police officers, acting

without a warrant, conducted an armed entry and search of REYES' residence in Las Vegas, Nevada. Other agents having determined that the Oldsmobile they observed in the Hacienda parking lot was registered to a Mrs. Sonia Reyes at that address pursuant to a records check with the Nevada Department of Motor Vehicles, Bustos undertook the warrantless invasion of Petitioner's home at gunpoint in order to determine whether he could recognize anyone present as one of the occupants of the tan automobile he had allegedly observed in his rear view mirror. Unable to identify Petitioner REYES with any confidence, Bustos nevertheless took him into custody, following a warrantless search of the home, on a state stolen property charge (which was never filed), and transported REYES to DEA headquarters for interrogation. Pursuant to DEA instructions, Mrs. Reyes' Oldsmobile was seized, impounded and forfeited. The auto w neither equipped with mobile communications capability nor any type of equipment that would aid in "counter-surveillance", as suspected by the DEA.

As the District Court later ruled, the warrantless residential arrest of Petitioner REYES and contemporaneous search of his home were not supported by probable cause and were otherwise conducted in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

Similarly, the arrest of Petitioner RODRIGUEZ was also remote in both time and place from the alleged events of the preceding day. Petitioner was purportedly identified as being the unknown passenger of the tan Oldsmobile upon observation by DEA agents elsewhere in the county riding in a GMC truck. The vehicle was thereupon stopped, and RODRIGUEZ was placed under arrest.

During the months before trial, Ravelo expressed concerns to his Pre-Trial Services Officers that REYES considered him

resonsible for his own arrest, and that Ravelo feared reprisal by REYES and Fernandez, who were next-door neighbors. The Pre-Trial Services Officer informed Assistant Attorney General Donald J. Campbell, who, together with DEA agents Bustos and Luke participated in a subsequent ex parte meeting with Ravelo.

At this secret meeting, Ravelo revealed a radically paranoid, antagonistic animus toward petitioner REYES. Expressly incriminating REYES, Ravelo revealed his own guilt in respect to the pending charges. Expressing profound vindictiveness, Ravelo told the prosecutor that he would like to testify against REYES alone, but did not want to incriminate or otherwise jeopardize the defense of any of the other defendants.

Following the meeting with Ravelo, a continuing investigation was initiated. To aid in their investigation, agent Bustos approached Juan Farinas, who had shared a cell with Fernandez at the Clark County Jail. In exchange for procuring his immediate release from custody on independent state narcotics charges and for violations of parole and probation on previous narcotics charges and other consideration in the disposition of various criminal cases, and regular and considerable cash payments, Farinas agreed, at the behest of Agent Bustos, to meet with Fernandez and, while wearing a wire, attempt to engage him in incriminating conversation. Specifically, Farinas was instructed by Agent Bustos to characterize Ravelo as a potential cooperating witness for the prosecution and to promote the advisability of assassinating him prior to trial. Farinas was further directed by Bustos to attempt to generate the participation of Petitioner REYES in such discussions.

Pursuant to this initiative, Farinas met with Fernandez, and advising the pre-trial elimination of Ravelo, attempting to persuade Fernandez to retain him to carry out the suggested execution. The suggestion was rejected by Fernandez. Despite

Farinas' persistent efforts to include Petitioner REYES in such discussions, REYES neither met with nor spoke to Farinas at any time.

Nevertheless, claiming to have "highly reliable information", clearly corroborated by electronic surveillance, Campbell again contacted and met with Ravelo one month before trial, and together with agent Bustos, told Ravelo that their investigation had conclusively established that consistent with his own suspicions, Fernandez and REYES were planning his imminent assassination. Well aware of Ravelo's paranoia as well as his vindictivenes toward REYES, and seeking to secure agreement to testify as a cooporating witness, Campbell and Bustos suggested to Ravelo that his very life and the lives of his wife and children may depend upon his enrollment in the Witness Protection Program and his assistance in securing the convictions of REYES and Fernandez. The prosecutor assured Ravelo that in exchange for his cooperation, both REYES and Fernandez, who were out on bail, would be taken into custody on charges of conspiracy to commit murder. Ravelo agreed.

As promised, agent Bustos obtained warrants for the arrest of REYES and Fernandez. Filing a Complaint and Affidavit before the Magistrate claiming that reliable informant information, independently corroborated by electronic surveillance, had established that REYES and Fernandez were engaged in a conspiracy to murder their co-defendant. Bustos further obtained warrants to search their homes. Both were arrested, bail was revoked and an independent third indictment was returned against REYES and Fernandez only charging them with conspiracy to commit murder.

Following subsequent proceedings on defense motions efore the same Magistrate, this second invasion of Petitioner REYES' home by Bustos was also ruled illegal by the District

Court. Indeed, having received the inconsistent and evasive testimony of both Bustos and Farinas during pre-trial hearings on defense motions in the solicitation case, the magistrate, invalidating his own search warrant, concluded in a strongly worded Opinion that Bustos had submitted a materially untruthful affidavit in support of its issuance, that he did not in fact have probable cause; and that in so causing yet another illegal search of REYES' home, Bustos violated Petitioner REYES' constitutional rights in bad faith. Indeed, the entire indictment was ultimately dismissed by the Honorable Lloyd D. George, United States District Judge. Moreover, notwithstanding that this intervening indictment was the sole reason for revoking REYES' bond in the principle case, he was denied readmission to bail.

At some point after the dismissal of the intervening indictment, Ravelo backed out or otherwise failed to enter the Witness Protection Program. The reasons why this change occurred have never been developed and are the subject of uniformly sealed documents.

Prior to trial, petitioners filed motions for, inter alia, severance and relief from prejudicial joinder pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure; for discovery of all exculpatory and impeachment information pursuant to the jurisprudence of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; and for production of all *Jencks* Act material pursuant to the provisions of 18 U.S.C. Sec. 3500.

Trial was commenced on August 19, 1985. However, after four days of testimony a mistrial was declared following the refusal of the government's star witness, informant Barry Seal, to comply with the Court's repeated admonition to refrain from persistent prejudicial and inflammatory remarks during direct examination by Assistant United States Attorney Donald J. Campbell.

On August 26, 1985 trial commenced before a new jury. As a result of the denial of Petitioners' Joint Motion For Severance, REYES and RODRIGUEZ were subjected during the trial of their cause to the overwhelming mass of extremely damaging evidence offered against their co-defendants pursuant to Counts I, II, III, and IV, which evidence, the District Court agreed, was irrelevant and inadmissible to them.

After the government rested, Co-Defendant Ravelo, against the strenuous advice of his attorney, took the stand in his own defense. He proceeded to testify, inter alia, that upon his arrival in the parking lot of the Continental Hotel, he was compelled to load the pickup he was driving with the boxes allegedly containing cocaine by DEA agent Bustos, who Ravelo said forced him to do so at gunpoint. At a later point in time, after entering into a post-conviction agreement to testify against remaining co-defendants, Ravelo admitted in subsequent judicial proceedings that he did in fact knowingly commit perjury when he took the stand.

It was during cross-examination by Assistant Attorney General Donald J. Campbell that counsel for the Petitioners learned for the first time that there had been ex parte meetings and communications with Ravelo prior to trial. Moreover, the prosecutor proceeded to personally cross-examine Ravelo using information revealed to him by Ravelo during the course of those ex parte meetings. Indeed, Campbell, who personally knew from Ravelo's own admissions precisely how to undermine the testimony and in what specific respects and to whom Ravelo had not only revealed his own guilt but had expressly incriminated Petitioner REYES, proceeded to employ this information during his cross-examination without first making any attempt to advise the Court of the patent ethical dilemma into which he had knowingly ventured. Thus, when these historic facts were revealed for the first time at side-bar, having

never been conveyed to counsel for Petitioners either by the government or by Ravelo at Campbell's request, counsel again moved for mistrial, severance and further, for the dismissal of the indictment pursuant to previously articulated grounds and on the basis of prosecutorial misconduct resulting in direct and specific prejudice to the Petitioners. Although the District Judge expressed both shock and dismay in response to these eleventh hour revelations of clearly troubling prosecutorial behavior, these motions were denied on all grounds. As a result, Campbell was permitted to thoroughly incriminate Ravelo, REYES and RODRIGUEZ with information derived from the uncounselled post-indictment representations of Ravelo in the wake of the so-called "murder plot" investigation.

Throughout his closing argument, Campbell exacerbated the prejudice of all of the foregoing by engaging in what is submitted was a highly inflammatory and consistently improper summation. In addition to the use of profoundly inflammatory rhetoric and invective the prosecutor misstated the evidence, argued inferences in violation of stipulated limitations to the admission of certain evidence and exhibits, argued the application of evidence in excess of the scope of its admission by court ruling, and repeatedly shifted the burden of proof to the defense.

Both Petitioners were acquitted by the jury on Count VI of the superseding indictment charging them with possession with the intent to distribute cocaine. However, Petitioners were both convicted of conspiracy to distribute and to possess with the intent to distribute cocaine as alleged in Count IV.

Prior to sentencing, Petitioners filed a Joint Motion and Supplemental Motion for New Trial, on October 2, 1985 and October 24, 1985, respectively, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on grounds of newly discovered evidence of both *Jencks* and *Brady* violations by

the prosecution. On November 24, 1985, oral argument was heard by the District Court in respect to Petitioners' Motion For New Trial, pursuant to which sentencing was deferred as to Petitioners only pending determination of the *Jencks* and *Brady* issues unique to their cases.

Prior to the imposition of sentence, Assistant United States Attorney Campbell provided certain discovery materials pertaining to the pending prosecution of the "murder plot." Among these materials was a transcript of the proceedings before the Federal Grand Jury pursuant to which the indictment for solicitation of murder was returned. Pursuant to the examination of Campbell before the grand jury, Bustos testified to the historic events underlying both prosecutions. Bustos testified in direct and irreconcilable contradistinction to the testimony he later gave at the trial of the Petitioners. For example, he testified that Petitioner RODRIGUEZ was at the Hacienda Hotel *at all times* during the controlled delivery of the alleged cocaine to Co-Defendant Ravelo in the parking lot of the Continental Hotel. Moreover, Bustos stated before the grand jury that the tan automobile allegedly occuped by REYES and RODRIGUQEZ had left the area *prior to the so-called "caravan" that left from the Hacienda to the Continental Hotel. His testimony before the grand jury was devoid of any reference* to his having been followed by this automobile, or of any "counter-surveillance" activities supposedly conducted by the occupants of the vehicle, or otherwise the presence of either of the Petitioners during any of the relevant events.

On December 11, 1985, Petitioners' Motions For New Trial were denied. Reconsideration was urged but rejected at sentencing whereupon Petitioners RODRIGUEZ and REYES were committed to the custody of the Attorney General of the United States for fifteen and ten year terms of incarceration respectively. Appeal to the Ninth Circuit was to prove

fruitless, as was the subsequent Motion For Rehearing and Suggestion For Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

1. The ruling of the lower court, that the failure to disclose the *Jencks* and *Brady* materials was "immaterial", is both without precedential support in the Ninth Circuit and in conflict with the rulings of numerous other federal courts, and is at odds with the statutory provisions of 18 U.S.C. Sec. 3500 (the *Jencks* Act). Pursuant to the provisions of the *Jencks* Act, "[a]fter a witness called by the United States has testified on direct examination," the government must "produce *any statement* (as thereafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." *Id. See also, United States v. Goldberg*, 425 U.S. 94 (1976); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967). As the courts have made clear: "[T]here are *no exceptions* to the Jencks rule that *all* statements relevant to the subject matter of the witness' testimony *must be produced* after direct examination of the witness." *United States v. Bibbero*, 749 F.2d 581, 585 (9th Cir. 1984) (emphasis added); *Ogden v. United States*, 303 F.2d 724, 739-40 (9th Cir. 1962), *cert. denied*, 376 U.S. 973 (1964). In the seminal case of *Napue v. Illinois*, 360 U.S. 264, 269 (1959), this Court observed that with respect to impeaching evidence: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Such evidence is particularly important where, as in this case, it substantially undermines the credibility of an important government witness. *See generally, United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978); *United States v. Seijo*, 415 F.2d 1357 (2nd Cir. 1972), *cert. denied*, 429 U.S. 1043 (1975); *United States v. Rosner*, 516

F.2d 269 (2nd Cir. 1975), *cert. denied*, 427 U.S. 911 (1976). Indeed, as this Honorable Court pointed out in *Goldberg*, *supra*, and as the Ninth Circuit has previously stated: "It is not for the courts to speculate whether the omitted portions could have been used effectively at trial." *Bibbero*, *supra* at 585.

2. Review is merited in that the Court of Appeals for the Ninth Circuit has so far sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This departure from accepted practice and procedure has resulted in the denial of Petitioners' right to a fair trial, grounded in due process. In particular the errors complained of are: sanctioning ex parte meetings by the prosecutor; failure to grant severance; failure to remedy the *Jencks* and *Brady* violations discussed at length above; failure to grant a Motion For New Trial in the interests of justice, as provided for by Rule 33, Federal Rules of Criminal Procedure; and in the alternative, failure to grant a Rule 33 Motion For a New Trial based on newly discovered evidence, in the form of grand jury testimony of impeachment value and exculpatory interest. The result being error of constitutional dimensions in that Petitioners have been denied substantive rights secured by the Fifth and Sixth Amendments and the supporting statutory authority of 18 U.S.C. Sec. 3500.

3. This Honorable Court should not give its sanction to the manifest impropriety underlying the prosecution in the case at bar. This case presents the Court with a properly postured factual scenario in which to rule on the concept of cumulative effects of bad faith police actions and prosecutorial misconduct. Lower court rulings on the particular individual events have established that numerous errors did occur in this case. The question neither of those courts reached was the cumulative effect of those errors. Some of the facts and errors relied upon by Petitioners are:

(A) The series of events that resulted in the prosecutions in the case at bar were manipulated and engineered by the Drug Enforcement Agency to a degree that is questionably proper. While the acts of the DEA may not rise to the level of creating a crime from "whole cloth," this case walks that thin, amorphous line of propriety. For example, the DEA provided the agent provocateur, Barry Seal, who made the contacts and set up the flight from outside the territorial jurisdiction of the U.S.A.; the DEA provided the pilot (and most probably the plane); the DEA created the flight plan that resulted in the importation of the cargo to within the territorial jurisdiction of the U.S.A.; the DEA provided the instructions of where and when to land; the DEA provided the second inland link to Henderson, Nevada from Tyler, Texas; the DEA provided the ground crew; the DEA set up the terms of payment for the personnel and controlled the cargo until those terms had been met. In short, the defendants in this case were only really along for the ride. While they may have intended to fly cocaine from Bolivia to the British West Indies, they never envisioned the course of events that eventually occurred. Petitioners respectfully note that there would have been no crime against the laws of the United States were it not for the manipulation and control of the DEA and their undercover operatives. The propriety of relying on a course of events such as occurred in the case at bar to support the conviction of peripheral actors, such as Petitioners, raises not insubstantial questions about substantive due process;

(B) The initial residential search and seizure of Petitioner REYES was not supported by probable cause and was in violation of his rights under the Fourth and Fourteenth Amendment;

(C) The prosecutor conducted a secret ex parte post-indictment meeting with a member of the defense team without the presence or knowledge of that defendant's attorney:

(D) The prosecutor, along with the aid of agent Bustos instigated and maintained an investigation of Petitioner REYES, and despite the fact that that investigation was wholly without merit, represented to the witness Ravelo that the investigation was in fact successful;

(E) The prosecutor, along with the aid of agent Bustos, played upon the known paranoid tendencies of co-defendant Ravelo with patently untruthful information in an attempt to influence Ravelo into testifying, under the guise that his life and the lives of his fami'y could depend upon obtaining a conviction of Petitioner REYES;

(F) The prosecutor exploited Ravelo under false pretenses and obtained substantial amounts of damaging information that he used at trial against the defense team, for example:

(1) Ravelo incriminated himself and others on the defense team believing what Campbell and Bustos told him to be true;

(2) Ravelo permitted inspection of the books of a business in which Petitioner REYES was a partner without advising counsel or REYES;

(3) Ravelo allowed other individuals to be interviewed by government agents pursuant to his collaboration so as to enhance the incrimination of REYES and RODRIGUEZ;

(4) Ravelo's statements in the ex parte meetings were turned against him and Petitioners at trial;

(G) Agent Bustos submitted a materially untruthful complaint and affidavit in support of a search and arrest warrant for Petitioner REYES;

(H) That agent Bustos acted upon this warrant knowing

that the matters contained in the supporting affidavit were wholly untruthful;

(I) That subsequent to issuance and execution of those warrants, the issuing Magistrate recalled the warrants, finding that agent Bustos acted in bad faith and violated the constitutional rights of Petitioner REYES;

(J) That in an attempt to obtain an indictment against Petitioner REYES on solicitation of murder charges, agent Bustos abused the grand jury process;

(K) That upon subsequent review, the District Court dismissed the indictment;

(L) That despite the fact that the sole reason for revoking REYES' bail was the supervening indictment on solicitation of murder and the subsequent dismissal of that indictment, the prosecutor argued against readmitting REYES to bail;

(M) Since the conclusion of the trial in the instant case, it has become apparent that the convictions of the Petitioners was procured in such blatant derogation of the substantive rights secured by the Fifth and Sixth Amendments to the United States Constitution and the correlative statutory authorities as to demonstrate complete disregard for the essential underlying principles upon which the binding prosecutorial obligations therein mandated are based. Indeed, the *Jencks* and *Brady* material which was suppressed would not only have undermined the credibility of all of the government's key law enforcement witnesses and the essential integrity and internal consistency of the government's factual theory of prosecution, but was also dispositively exculpatory in character as to these Petitioners.

(N) Unconstitutionally inflammatory and otherwise improper summation by the prosecutor. In particular:

(1) The prosecutor consistently shifted the burden of proof to the defense, particularly these Petitioners, throughout closing argument;

(2) The prosecutor misstated critical evidence during the course of his summation and otherwise referred to matters and contentions not in or otherwise supported by the evidence;

(3) The prosecutor engaged in argument contrary to stipulation of fact and law;

(4) The prosecutor purposefully exploited each and every aspect of the above-mentioned sources of prejudice particularly in so far as the same reflected upon the Petitioners and specifically predicating his incurably inflammatory argument upon the undisclosed information gained from Ravelo between indictment and trial;

(5) The prosecutor fully exploited the impermissible inferences of guilt by association inherent in a multiple-defendant trial after he had fought the severance requested by Petitioners throughout trial.

Granting of this Petition to allow full briefing of the merits of this issue would prove fruitful to the jurisprudence of this country.

4. The cumulative effect of the above-stated reasons makes this an ideal case for clarifying the issues presented. The adjudicative facts are clear; the issues are ripe for decision; the previous rulings of this Honorable Court are what gave rise to the issues; there is a multi-faceted circuit conflict as to their proper resolution; the number of persons affected is substantial; and the rights go to the very heart of the constitutional guarantees that attend the criminal justice system in this country.

CONCLUSION

This Honorable Court should grant the instant Petition to bring the decision of the Ninth Circuit into line with precedent. Neither Ninth Circuit precedent, nor the law of the other Circuit Courts, nor the precedent of this Court support the conclusion reached in the court below. This Court should exercise its supervisory powers to remedy the wrong that has been wrought in regards to production of *Brady* and *Jencks* materials and to clarify the proper standards for evaluating the cumulative effect of numerous substantive errors.

Respectfully submitted,

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APPENDIX A

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Nos. 85-1341/1342/
Plaintiff-Appellee	)	1343/1344*
	)	86-1006/1007/
vs.	)	1230
	)	
LEOCADIO MORENO, FRANCISCO MONTOYA, HECTOR OROZCO, ORLANDO RAVELO, LUIS RODRIGUEZ, RAUL REYES, and FERNANDO FERNANDEZ,	)	D.C. No. CR-85-10-HDM
Defendants-Appellants.	)	**MEMORANDUM****

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding
Argued and submitted November 9, 1987
San Francisco, California

Before: SCHROEDER, PREGERSON, and BRUNETTI, Circuit Judges.

Appellants Moreno, Montoya and Orozco imported eighty-nine kilograms of cocaine into the United States from Bolivia

*The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

**This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

with the help of government undercover agents. Appellants Ravelo, Rodriguez, Reyes, and Fernandez were to receive and distribute the cocaine in Las Vegas, Nevada. Moreno, Montoya, Orozco, Ravelo, Rodriguez, and Reyes appeal their convictions, following a jury trial, for conspiracy to distribute and possess cocaine. Fernandez appeals his conviction in a separate jury trial for the same conspiracy. We affirm.

The Fernandez Appeal

Fernandez contends: (1) that there was insufficient evidence supporting his conviction for conspiracy and possession; (2) that the district court erred by admitting into evidence valuable jewelry seized from Fernandez during his arrest; and (3) that three comments made by the prosecution during closing argument constituted prejudical error requiring reversal.

The government offered substantial evidence from which jurors culd have found beyond a reasonable doubt that Fernandez joined in a conspiracy to obtain possession of eighty-nine kilograms of cocaine from undercover government agents in order to distribute it. *See Jackson v Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reese*, 775 F.2d 1066, 1070-71 (9th Cir. 1985).

The government's proof sufficiently established a single conspiracy to distribute the cocaine, involving all nine codefendants, as charged in the indictment. *See United States v. Bibbero*, 749 F.2d 581, 587-88 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985). The government offered sufficient evidence to establish that Fernandez knowingly participated in the conspiracy to possess and distribute cocaine, and was not merely present at planning meetings and during the delivery of the cocaine as an acquaintance of the conspirators. *See United States v. Fleishman*, 684 F.2d 1329, 1335-41 (9th Cir.), *cert.*

denied, 459 U.S. 1044 (1982); *United States v. Thomas*, 586 F.2d 123, 132 (9th Cir. 1978).

There was sufficient evidence to support Fernandez's conviction for possession of cocaine with intent to distribute. Because there was sufficient evidence that Fernandez participated in the distribution conspiracy, and that co-conspirators Ravelo and Orozco obtained possession of the cocaine, the jury, pursuant to a *Pinkerton* instruction, properly convicted Fernandez of a crime committed by co-conspirators in furtherance of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); *United States v. Douglass*, 780 F.2d 1472, 1475-76 (9th Cir. 1986).

Although the district court erred in admitting into evidence valuable jewelry seized from Fernandez at the time of his arrest, its admission was harmless error. The probative value of the jewelry, as supporting evidence of Fernandez's participation in prior narcotics transactions, was substantially outweighed by the danger of unfair prejudice. *See United States v. Dupuy* 760 F.2d 1492, 1499-1500 (9th Cir. 1985). The issue is whether it is more probable than not that this minor piece of evidence affected the jury's verdict, *see United States v. Rohrer*, 708 F.2d 429, 432 (9th Cir. 1983), in light of all the other evidence submitted. The erroneous admission of the jewelry was harmless.

Finally, the three challenged comments, made by the prosecutor during closing argument, do not constitute prejudicial error requiring reversal of Fernandez's conviction. In his closing argument, the prosecutor improperly vouched for the credibility of a government witness; any prejudice caused by this comment was effectively neutralized by the court's three curative jury instructions. *See United States v. Lopez*, 803 F.2d 969, 972-73 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1958

(1987). In rebuttal argument, the prosecutor commented on the defense's failure to cross-examine two government witnesses on the substance of their testimony. This fair and invited reply to the defense's challenge to the witnesses' credibility was not improper. *See United States v. Flake*, 746 F.2d 535, 541 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985). Also, in rebuttal, the prosecutor commented on the defense's failure to present certain exculpatory evidence. As this comment did not refer, implicitly or explicitly, to Fernandez's failure to testify or improperly shift the burden of proof, it was not error. *See United States v. Soulard*, 730 F.2d 1291, 1306 (9th Cir. 1984).

THE OTHER APPEALS

Moreno and Orozco argue that the government's extensive involvement in the smuggling scheme violated their due process rights as outrageous government conduct. Whether the government's conduct is so outrageous as to constitute a due process violation is a question of law and is reviewed de novo. *United States v. Bogart*, 783 F.2d 1428, 1431 (9th Cir. 1986). We have stated that prosecution is barred "when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983).

We have said that physical or psychological coercion would constitute outrageous conduct, as would a crime manufactured by the government "from whole cloth." *Bogart*, 783 F.2d at 1436. Thus, in cases not involving police brutality, we have recognized the outrageous conduct defense only when the police engineer and direct a criminal enterprise from start to finish or when the police completely fabricate the crime solely to secure a defendant's conviction. *Id.* We have refused to apply the defense when the criminal enterprise was already

in progress at the time the government became involved. *Id.* at 1437.

Here, although a number of government agents did provide substantial assistance to the smuggling conspiracy, the government involvement did not rise to the requisite level of outrageousness. The government clearly did not create the crime.

Lack of Jurisdiction

Orozco challenges his conviction for lack of personal jurisdiction, contending that he was brought to the United States against his will by the plane's pilot. However, the means by which a defendant is brought within a jurisdiction does not affect a state's power to bring him to trial. *United States v. Valot*, 625 F.2d 308, 309 (9th Cir. 1980). Therefore, the district court had personal jurisdiction over Orozco.

Co-Conspirator Statements

Reyes and Rodriguez argue that the admission of statements made by co-defendant Ravelo was improper. The district court permitted Ravelo's testimony under Fed. R. Evid. 801(d)(2)(E) as a co-conspirator's statement.

To admit a co-conspirator's statement under Rule 801(d)(2)(E), a conspiracy must have existed and the statement must have been made in the course of, and in furtherance of, the conspiracy. *Bourjaily v. United States*, 107 S. Ct. 2772, 2778 (1987). Since other evidence implicated Reyes and Rodriguez in the scheme to obtain and distribute the cocaine, and since Ravelo's statements concerned the cocaine's delivery, Ravelo's statements were admissible under Rule 801.

Improper Authentication

Rodriguez argues that the district court admitted documents that were not properly authenticated. The documents involved were copies of Colombian indentification records from the Colombian Civil National Registry. Federal Rules of Evidence 902(3) and (4) do not require extrinsic evidence of authenticity when copies of foreign public records are certified as correct by the record's custodian, and the genuineness of the custodian's signature and official position is certified. Here,the documents were certified by the Civil National Registry of Colombia, and contained an authentication certificate executed by an official at the United States Embassy in Colombia. Thus, no extrinsic evidence of authenticity was required.

Past Bad Acts

Orozco contends that the district court erred in admitting his statement regarding the need to bribe officials in order to transport cocaine in South America. Although Orozco objects to the admission of this testimony under Federal Rule of Evidence 404(b), Rule 404(b) is inapplicable because Orozco does not assert in that statement that he has committed a crime or bad act. Therefore, the testimony is evaluated under Rule 403, as to whether its probative value was substantially outweighed by the danger of unfair prejudice. The testimony was relevant, and any prejudicial impact was minimized due to the district court's cautionary instruction explaining the purpose for which the jury could consider the evidence.

Brady and Jencks Act Issue

Reyes, Rodriguez, Orozco and Montoya contend the government's failure to disclose the August 1, 1985, grand jury testimony of government agent Bustos violated *Brady v.*

Maryland, 373 U.S. 83 (1983). Specifically, appellants argue that a discrepancy exists between Bustos' grand jury and trial testimony and thus that Bustos' undisclosed grand jury testimony was material to the defense for the exculpatory purpose of impeaching Bustos.

The transcript was of Bustos' testimony before the grand jury investigating a conspiracy to murder Orlando Ravelo. Appellants argue the grand jury testimony would have been valuable for impeachment purposes.

The district court concluded that the government violated the Jencks Act by inadvertently not disclosing the transcript, but that the mistake was immaterial. As the district court explained in its order denying motions for new trial, the agent's testimony was in fact substantially consistent in both proceedings and the minor uncertainty as to defendant Rodrigues's location, if available to the defense, could not reasonably have affected the jury's assessment of the witnesses' credibility or the outcome of the trial.

Sufficiency of the Evidence

Moreno, Montoya, Rodriguez,and Reyes contend that there was insufficient evidence to convict them. Moreno was convicted of count one, conspiracy to import a controlled substance; count two, importation of cocaine; count three, interstate travel in aid of racketeering; count four, conspiracy to distribute and possess with intent to distribute concaine; and count five, distribution of cocaine. Montoya was convicted of counts one, two, and three of the above, and Rodriguez and Reyes were convicted of count four.

As to Moreno, the evidence presented at trial demonstrates the following: Moreno initiated the scheme to ship cocaine from

South America, with the ultimate destination being the United States; Moreno took control of this operation by assuming financial responsibility, and by making decisions as to timing of events and location for the distribution of the cocaine; Moreno conspired with Orozco to ship the cocaine out of Bolivia; Moreno conspired with others to deliver the cocaine into the United States; he traveled from Florida to Texas, and then on to Las Vegas with the intent to distribute cocaine; and he conspired with others to deliver and distribute the cocaine in Las Vegas.

The jury was entitled to consider the evidence as a whole, including all reasonable inferences that could be drawn therefrom. *United States v. Kipp*, 624 F.2d 84, 85 (9th Cir. 1980). There was sufficient evidence for the jury to conclude beyond a reasonable doubt that Moreno was guilty of the crimes charged in counts one through five.

Montoya contends that he was not a knowing and active participant in the chain of events leading up to the importation of cocaine into the United States, and that he did nothing in Las Vegas related to the distribution of cocaine.

Evidence presented at trial showed that Montoya was present at a meeting at the Opalocka airport on January 10, 1985, where Moreno introduced him to government agents as one of his associates. At this meeting, a discussion was held concerning problems with bringing the cocaine from South America, and the possibility of offloading the cocaine in the United States. On January 11, 1985, Moreno, Montoya, and Orozco met with undercover government agents at the Victoria Station Restaurant in Miami, where financial problems related to bringing cocaine to the United States were discussed. At this meeting, Montoya assured one of the government agents that additional expense money would be available that

night or the next day. Later the same day, at the Miami International Airport, Montoya, Moreno, and a government agent discussed airplanes, and Montoya referred to one plane and said it would be a great plane "to do a trip with." On January 11, 1985, Montoya, Moreno, Orozco, and undercover government agents drove to Ft. Lauderdale, Florida and chartered a jet. On January 15, 1985, Montoya and Moreno, with a number of government agents, flew to Texas to rendezvous with the airplane flying from Colombia with the cocaine. He then flew on to Las Vegas where he shared a hotel room with Moreno. Finally, a business card taken from Montoya at the time of his arrest had the phone numbers of Rodriguez, Reyes, Ravelo, and Fernandez on it.

The evidence supported an appropriate inference that Montoya had joined in a common scheme with the other coconspirators, and that his actions were for the purpose of furthering the goals of the conspiracy. *See United States v. Garcia*, 721 F.2d 721, 725 (11th Cir. 1983). Viewing the record in the light most favorable to the government, a rational jury could properly find that Montoya was guilty of the crimes charged. *See United States v. Martinez*, 806 F.2d 945, 947 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2197 (1987).

Reyes and Rodriguez were both convicted of count four, conspiracy to distribute and possession with intent to distribute cocaine. They contend that the evidence at the trial established no more than the possibility of presence and association with the other defendants, and that this is not proof of criminal activity.

The record contains ample evidence of Reyes' and Rodriguez's participation in a conspiracy to distribute cocaine. It was Reyes' vehicles that were used to pick up the cocaine at the Continental Hotel, and to provide counter-surveillance

during the evening of January 16, 1985. Reyes was observed in his tan Oldsmobile during the evening of January 16, 1985, when it was used for counter-surveillance before the cocaine's delivery. The government also produced a list of phone calls made from Moreno's phone to Reyes' phone on the days immediately before the cocaine arrival in Las Vegas. On the evening the cocaine was delivered in Las Vegas, appellant Ravelo stated to a government agent that the people in the light-colored Oldsmobile were the bosses; he was referring to Reyes and Rodriguez.

The evidence produced at trial as to Rodriguez also supports his conviction for conspiracy to distribute and possession with intent to distribute cocaine. There was evidence that Rodriguez, after conducting surveillance, told Moreno that a police car had been spotted at the hotel shortly before the cocaine was to be delivered; that Rodriguez brought $40,000 to Moreno for plane and pilot expenses; and that Rodriguez was one of the bosses Ravelo referred to in his statement to the government.

Motion for Severance

Montoya, Reyes, and Rodriguez argue that the district court erred in denying their motions for severance. To reverse a district court's denial of a motion for severance, a party must demonstrate "that joinder was so manifestly prejudicial that it outweighed the dominant concern with judicial economy." *United States v. Armstrong*, 621 F.2d 951, 954 (9th Cir. 1980).

Montoya sought a severance because he believed that Moreno would provide exculpatory testimony at a separate trial. The district court did not abuse its discretion in finding that Montoya did not carry his burden in showing that Moreno would have testified on his behalf at a separate trial. *See United*

States v. Jenkins, 785 F.2d 1387, 1393 (9th Cir. 1986). Rodriguez and Reyes failed to show that the denial of their motion to sever was so manifestly prejudicial that it outweighed the dominant concern with judicial economy, and denied them a fair trial. *See Douglass*, 780 F.2d at 1478.

Sentencing Disparity

Montoya and Orozco contend that the district court erred in sentencing them to lengthier sentences than two co-defendants because they exercised their right to stand trial. There is no evidence that the district court based its discretion in sentencing Montoya and Orozco because the sentences did not exceed the statutory maximum, and reasons for the disparity are discernible on the record. *See United States v. Paris*, 827 F.2d 395, 402 (9th Cir. 1987); *United States v. Spinney*, 795 F.2d 1419, 1414 (9th Cir. 1986).

Prosecutorial Misconduct

Reyes and Rodriguez contend that the district court erred in denying their motions to dismiss and for mistrial on grounds of prosecutorial misconduct. Their contention does not provide a sufficient record on which to review the prosecutor's conduct. *See Hamblen v. County of Los Angeles*, 803 F.2d 462 (9th Cir. 1986); 9th Cir. Rule 28-2.8 (requiring that briefs have references to the record). Their allegations do not rise to the level of misconduct requiring reversal. *See United States v. Hasting*, 461 U.S. 499, 510-111 (1983); *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986).

Ineffective Assistance of Counsel

Ravelo contends that he was denied effective assistance of counsel at trial. He has failed to show that his counsel acted

improperly to his prejudice; there was overwhelming evidence of his guilt. *See Strickland v. Washington*, 466 U.S. 668, 687, 697 (1984).

AFFIRMED.

APPENDIX B

¶ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Goverment witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the

defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Supreme Court, U.S.
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(2)

No. 87-2114

In the Supreme Court of the United States

OCTOBER TERM, 1988

LUIS RODRIGUEZ AND RAUL REYES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a violation of the Jencks Act, 18 U.S.C. 3500, is subject to the harmless error standard on appeal.

2. Whether petitioners are entitled to a new trial based on government misconduct.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1988. A petition for rehearing was denied on April 29, 1988. The petition for a writ of certiorari was filed on June 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of conspiracy to distribute cocaine and to possess cocaine with the intent to distribute it, in violation of 21 U.S.C.

846. Petitioner Rodriguez was sentenced to 15 years' imprisonment, and petitioner Reyes was sentenced to 10 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-12a).

1. The evidence at trial showed that petitioners were members of a narcotics conspiracy that imported approximately 89 kilograms of cocaine into the United States from Bolivia. Petitioner Reyes furnished vehicles that were used to pick up the cocaine and provided counter-surveillance during the transfer of the narcotics. Petitioner Rodriguez assisted in providing counter-surveillance and also supplied money for plane and pilot expenses incurred in delivering the cocaine. Pet. App. 1a-2a, 9a-10a.

2. Following their conviction, petitioners moved for a new trial, contending that the government had violated the Jencks Act, 18 U.S.C. 3500, and this Court's decision in *Brady* v. *Maryland,* 373 U.S. 83 (1983). In particular, petitioners claimed that the government had failed to disclose a transcript of the grand jury testimony of Eugene Bustos, a government agent who had testified at trial. The district court denied the motion. Although it recognized that the grand jury testimony at issue involved a "separate and distinct" offense and that the failure to produce it was "inadvertent and not in bad faith," the court agreed that the government had violated the Jencks Act. 12/11/85 Tr. 4. The court concluded, however, that the violation was harmless. It explained that the failure to produce the transcript did not "deter[ ] counsel for the defense from a thorough cross examination of Agent Bustos" (*ibid.*). Moreover, the court found, "the transcript at issue is essentially duplicative of information disclosed by the government to the defendants prior to trial and the testimony of Agent Bustos during the trial" (*id.* at 4-5). The court also rejected petitioners' *Brady* claim, finding that there was "not a reasonable probability that had the tran-

script of Agent Bustos' testimony been disclosed to the defense in a timely manner, the result of the trial would have been different" (*id.* at 6). The court explained that Agent Bustos was only one of several witnesses who had testified at trial to the same matters described in the grand jury testimony; that the testimony in question was not central to the charge on which petitioners had been convicted; and that the grand jury testimony was merely "a general summary of the events" and not "a detailed account of what occurred" (*id.* at 6-7). "Finally, and most importantly," the court added, there were no "discrepancies of signific[a]nce between the testimony of Agent Bustos at trial and his summary testimony before the grand jury which would have been particularly helpful to the defense in its efforts * * * to impeach Agent Bustos" (*id.* at 7).

3. The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-12a). It upheld the finding of the district court that "the agent's testimony was in fact substantially consistent in both proceedings" and that a minor discrepancy in the testimony "could not reasonably have affected the jury's assessment of the witnesses' credibility or the outcome of the trial" (*id.* at 7a). The court of appeals also rejected petitioners' claim of prosecutorial misconduct. It concluded that petitioners had failed to "provide a sufficient record on which to review the prosecutor's conduct" and that, in any event, "[t]heir allegations [did] not rise to the level of misconduct requiring reversal" (*id.* at 11a).

ARGUMENT

1. Petitioners contend (Pet. 14-15) that the court of appeals erred in rejecting their Jencks Act claim, stating that " '[t]here are no exceptions to the Jencks rule * * * ' " (Pet. 14 (citations and emphasis omitted)). The court of

appeals did not hold otherwise. It merely concluded that on the record at trial the government's violation of the Jencks Act was harmless. This Court has made clear that a Jencks Act violation is subject to a harmless error standard on appeal. See *Goldberg* v. *United States,* 425 U.S. 94, 111 n.21 (1976); *Rosenberg* v. *United States,* 360 U.S. 367, 371 (1959). Petitioners offer no reason to disturb the court of appeals' fact-bound determination that the failure to produce the transcript of Agent Bustos' grand jury testimony "could not reasonably have affected the jury's assessment of the witnesses' credibility or the outcome of the trial" (Pet. App. 7a).

2. Petitioners also provide (Pet. 14-19) a lengthy list of alleged abuses by the government that, in their view, constitute sufficient misconduct to warrant a new trial. The court of appeals correctly rejected that claim, for two reasons.

First, as the court explained (Pet. App. 11a), petitioners failed to provide record references for any of the asserted acts of misconduct. Rules 28(a)(3) and (4) of the Rules of Appellate Procedure require that the statement of the case and argument in an appellant's brief make appropriate references to the record. A court of appeals is "not required to search the record for error" (*Holt* v. *Sarver,* 442 F.2d 304, 307 (8th Cir. 1971)) and may refuse to entertain an argument that lacks the required record citations (see *McGoldrick Oil Co.* v. *Campbell, Athey & Zukowski,* 793 F.2d 649, 653 (5th Cir. 1986); *Lemelson* v. *United States,* 752 F.2d 1538, 1553 (Fed. Cir. 1985); *United States* v. *Gleason,* 726 F.2d 385, 388 (8th Cir. 1984); *Rebuck* v. *Vogel,* 713 F.2d 484, 487 (8th Cir. 1983)). In the present case, petitioners filed an opening brief in the court of appeals that lacked any record citations in the statement of facts or in that portion of the argument that catalogued the alleged acts of government misconduct. Indeed, peti-

tioners have repeated that mistake in their petition, making it difficult to determine precisely how the alleged abuses occurred. The court of appeals would have been amply justified in rejecting petitioners' claims for that reason alone.

Second, and in any event, the court of appeals considered petitioners' scattershot list of purported misconduct, and it concluded that the "allegations do not rise to the level of misconduct requiring reversal." Pet. App. 11a. That fact-bound determination warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1988

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